No. 8306.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

OPENING BRIEF FOR APPELLANT TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD.

FARNHAM P. GRIFFITHS,

HAROLD A. BLACK,

McCUTCHEN, OLNEY, MANNON & GREENE,

Roosevelt Bldg., 727 W. 7th St., Los Angeles,

Proctors for Libelant, Claimant and Appellant, Takachiho Shosen Kabushiki Kaisha, Ltd. (United Ocean Transport Co.).

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

PAGE

No. 8306.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

OPENING BRIEF FOR APPELLANT TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD.

I.

STATEMENT OF THE CASE.

These appeals are from a decision of the United States District Court for the Southern District of California upon the trial of three consolidated cases, all arising out of a collision between the Japanese freighter KOYEI MARU and one of three scows in tow of the tug DAVID P. FLEMING which occurred early in the morning of April 22, 1934, just outside the entrance to Los Angeles Harbor.

Shortly after the collision, an action was brought in admiralty by Wilmington Transportation Company, as owner of the tug and bailee of the scows, against the KOYEI MARU for damages to the scow. Soon thereafter the owner of the KOYEI MARU filed a libel against the tug and the scows, praying a recovery for the KOYEI MARU's damages.

Subsequently the owners of certain cargo aboard the KOYEI MARU at the time of the collision filed a libel *in personam* against Wilmington Transportation Company. The three actions were heard together. The court, taking the view that the KOYEI MARU was solely to blame, signed the following decrees from which these appeals are taken:

(a) An interlocutory decree in favor of Wilmington Transportation Company.

(b) A decree styled "Interlocutory Decree" (but in reality a final decree) dismissing the libel of the owner of the KOYEI MARU, and

(c) A decree also styled "Interlocutory Decree" (but which likewise was really a final decree) dismissing the libel of the cargo interests.

This brief is written with respect to the appeals from the first two decrees above mentioned and a separate brief is being filed by counsel representing the cargo.

In stating the facts, as we allege them to be, we shall narrate the circumstances of the collision largely as brought out by the witnesses for the KOYEI MARU without a detailed discussion, for the present, of any points on which the evidence may be in conflict. These matters, where material, will be more fully treated in the course of this brief. We shall also give a brief summary of the story told by the FLEMING'S witnesses.*

The KOYEI MARU is a Japanese freighter of approximately 10,000 tons dead-weight, about 450 feet in length over-all, powered by Diesel engines of about 4,000 horsepower and propelled by a single right-handed screw [Ap. pp. 340, 580]. The vessel was docked at Berth 58, San Pedro, prior to putting to sea the morning of the collision and at that time she was about one-third loaded. At approximately 1:30 A. M., April 22, 1934, she cast off from her berth and started on a voyage to San Francisco. Municipal Pilot Jorgenson was in charge of the ship when leaving, but Captain Watanabe was also on the bridge as were Third Mate Takahashi and the quartermaster. On the forecastle head were Chief Officer Hata, who was acting as lookout, the carpenter, boatswain and an apprentice, which last three, however, had other duties at the time. In the engine room were six engineer officers, three oilers and four wipers. [Ap. pp. 340, 530.] The vessel

---

*References to the apostles occurring in this brief will be designated by the abbreviation "Ap." followed by the page.

backed away from her berth, then turned, with the assistance of a tug, and steadied on a course approximately east by north, magnetic, on her way out to sea, passing Buoy No. 3 about 1200 feet off. At about 1:55 when the vessel was in the vicinity of No. 2 bellbuoy, the pilot said he was tired and asked to be relieved. He was, accordingly, dropped when that buoy was approximately abeam, and the vessel proceeded under the command of her master. Very shortly after the pilot left, Second Mate Honda went on the bridge and stayed there until after the collision. The ship proceeded on her way, commenced to round the light at the end of the breakwater and at about four minutes after two, was on a heading approximately southeast by east, magnetic, with the breakwater light abeam. Certain lights were then seen, later identified as those of the tug and the last two of the three scows in tow, which were then proceeding in a southerly direction across the KOYEI MARU'S course from her left to her right. At this time, however, all that could be descried was a dim blur of white light ahead, slightly on the starboard bow, and two faint lights, which appeared white, approximately two and four points, respectively, on the port bow, which looked like the lights of small fishing boats. The night was fairly clear but there was a slight mist on the horizon. The engine, which had been running for three minutes at half speed, was set slow ahead. The captain ordered a one blast signal and headed the vessel slightly to the right but on watching the light on the starboard bow it was observed to the broadening to that side and as no response to the whistle signal was received, the captain changed back to the original heading and proceeded ahead, noting that the light or lights to the starboard side were still broadening to the right and that the

lights to the port side were broadening to the left so that it was apparently quite safe to go under the stern of the craft to the right, whatever it was, and pass a safe distance ahead of the small craft to the left. No lights whatever were observed directly ahead.

Two minutes later (at 2:06), the captain observed that the light on the starboard side resolved itself into two white lights, one above the other, and at that time he saw, momentarily, the faint flicker of a green light just to the right of the white lights. At substantially the same moment, a dark object loomed up ahead, very slightly on the starboard bow. Captain Watanabe quite justifiably assumed the *two* white lights to be towing lights indicating a tow consisting of but one vessel and at once ordered the rudder hard left, rang up full astern on the telegraph, blew three blasts, and shaped his course to go astern of the dark object which he thought was the only scow in tow. Immediately after he blew the three blasts, the tug turned its searchlight on the "dark object" which ultimately proved to be the first of the three scows in tow. Even then, no lights of any kind were visible on this scow, indeed, no one on the KOYEI MARU saw any lights on this first scow at any time, before or after the collision. It developed later that the two white lights seen by Captain Watanabe were not towing lights but the tug's unscreened range light, and her stern light.

The lights to the left still appeared to be white. It was not until about eight minutes after two that these lights appeared as green and then Captain Watanabe, realizing

that instead of fishing boats they were apparently additional scows in tow, immediately ordered the port anchor dropped, which was done forthwith. The vessel's headway was substantially retarded but it was not possible completely to check it in time to avoid a collision and at 2:09 the KOYEI MARU struck the tow line between the first and second scows and a collision occurred between the Japanese vessel and the second scow, the port side of the KOYEI MARU and the forward starboard corner of the scow being the respective points of contact. Both the scow and the KOYEI MARU were damaged. Immediately after the collision, cross-bearings were taken on the breakwater light and the Point Fermin light which put the point of the collision about 2700 feet, east by south, a quarter south, magnetic, from the breakwater light. The KOYEI MARU proceeded back to the inner harbor as she was taking considerable water in No. 1 hold and temporary repairs had to be made before she could again proceed to sea. It developed that the scow with which the KOYEI MARU collided was one of three empty scows that were being towed to Santa Catalina Island for the purpose of picking up rock for work on the construction of the Long Beach breakwater.

The DAVID P. FLEMING is 75 feet long and 1200 feet of tow line intervened between the tug and the first scow. The first scow is 110 feet long and 600 feet of tow line intervened between it and the second scow; the second scow is 130 feet long and 600 feet of tow line connected

it to the last scow which is 110 feet in length. [Ap. pp. 139-142.] Accordingly, the length of the entire flotilla from the stem of the tug to the stern of the last scow was approximately 2825 feet. The FLEMING's witnesses state that the tug and tows proceeded for some minutes in a general southwesterly direction from a point inside the Long Beach breakwater and then swung around the buoy and light at the southwest end of that breakwater and headed on a course approximately south, magnetic, for Santa Catalina Island. There were four persons on the tug, but no one on any of the scows. When the tug reached a point about a half mile east of the San Pedro breakwater, the KOYEI MARU was seen (her masthead light, range light and green side light) heading approximately toward the first scow of the tow. The tug's witnesses claim that four successive danger signals (each consisting of several short blasts) were blown to warn the KOYEI MARU of the presence of the scows, but no one on the KOYEI MARU heard any signals from the tug at any time. The tug had an electric masthead light, towing lights and side lights, properly screened, an electric searchlight, a range light, not screened as the International rules require, but on the contrary, visible all around the horizon, and a stern light. The testimony on behalf of the tug is that each of the scows had kerosene running lights, in screens, and a white stern light. The tug makes about three knots with three empty scows in tow. The scows had about nine feet of freeboard. The tug's witnesses say that night was clear and the sea was smooth.

II.
SPECIFICATION OF ERRORS.

We respectfully contend that the trial judge erred in finding the KOYEI MARU solely at fault and in not finding the DAVID P. FLEMING and the scows solely at fault. The very detailed findings prepared by counsel and signed by the court covering each disputed question of fact (and finding against the KOYEI MARU on everything) made necessary extremely numerous assignments of error, some regrettably repetitious. We do not wish to burden this brief with a full statement of them all but shall content ourselves with a summary of those upon which we chiefly rely.

The faults of the DAVID P. FLEMING and her scows which we believe are apparent from the evidence divide into three main headings as follows:

1. With an extremely hazardous and dangerous tow occupying nearly half a nautical mile of sea room, the DAVID P. FLEMING failed in many respects to take the extraordinary precautions which, under the circumstances, were required of her; in particular:
   (a) She was negligent in failing to post any lookouts or attendants on the scows.
   (b) She was negligent in failing to use her searchlight at an earlier time to light up the first scow.
   (c) She was negligent in proceeding unnecessarily close to the entrance of the harbor (less than half a mile from the breakwater light) when there was plenty of room for her to have kept farther away. [See Assignments of Error I, XXVII, XXIX and XXXIII; Ap. pp. 605, 613, 614.]

2. The district court erred in finding that the admitted statutory faults of the David P. Fleming with respect to her lights, particularly her range light, could not have contributed to the collision. [See Assignments of Error X, XXIII, XXIV and XXV; Ap. pp. 607,610-612.]
3. The district court erred in not finding that the lights on the scows, particularly those, if any, on the first scow, were inefficient and defective. [See Assignments of Error XII, XXXI and XXXII; Ap. pp. 608, 613.]

The alleged faults of the Koyei Maru are not supported by the record.

1. The evidence shows that the Koyei Maru was not chargeable with anything that would reasonably give her notice that she was an overtaking vessel with respect to the tug and tow. [See Assignments of Error XVIII and XXXVI; Ap. pp. 609, 614.]
2. The district court erred in charging the Koyei Maru with fault for failure to stop her engines at 2:04 A. M. [See Assignments of Error XIII, XXII and XXXVII; Ap. pp. 608, 610, 615.]
3. The Koyei Maru was not at fault in failing to direct her course to starboard and cut in closer to the breakwater in proceeding out to sea. [See Assignments of Error XVI; Ap. p. 609.]
4. The Koyei Maru was not at fault with respect to her lookout. [See Assignment of Error XIX; Ap. p. 609.]
5. The Koyei Maru was not at fault for her failure to identify the lights at an earlier time or to hear the alleged danger signals. [See Assignments of Error III, IV, VI, VII, VIII, XIV, XXXVIII and XXXIX; Ap. pp. 605-608, 615.]

The foregoing points will now be discussed in order.

III.
ARGUMENT.

A.

The Evidence Having Been Taken in Large Part by Deposition the Appellate Court Is Free to Make Its Own Findings of Fact.

Before passing to a discussion of the points upon which we rely for a reversal of the decrees, we wish at the outset to state our contention that this appeal is a trial *de novo* in which this court is free to make its own findings of fact, even though they should be at variance with those made by the district judge.

In

The Kalfarli, 277 Fed. 391,

the Circuit Court of Appeals for the Second Circuit had before it the question of what effect was to be given the findings of a commissioner confirmed in all respects by the district judge. The court points out that it is well established law that on an appeal in admiralty, the whole case is open for trial *de novo.* The court then refers to the rule that on questions of fact based on conflicting testimony the decision of a trial court is entitled to great respect and will not be lightly reversed on appeal unless there is a decided preponderance of evidence against it or a mistake is clearly shown. This rule, however, the opinion states, loses much of its force where the testimony in large part was taken by deposition and the witnesses did not appear in open court. The court points out further that in any event the Appellate Court is never *concluded* by the fact that the witnesses were seen and

heard by the district court. After citing numerous authorities the court ruled that it was not bound by the findings of the district judge and proceeded to examine the testimony and to reach its own conclusions.

This court has also declared that where the testimony below is taken largely by deposition, there is not the same presumption in favor of the findings of the trial court as would be the case where the court heard all of the witnesses.

See

The Santa Rita (9th C. C. A.), 176 Fed. 890,

and see also, to the same effect,

The Ambridge, 42 F. (2d) 971;

Yamashita Kisen Kabushiki Kaisha v. McCormick Intercoastal S. S. Co., 20 F. (2d) 25, and

The Africa Maru, 54 F. (2d) 265;

2 C. J. S., Sec. 192, pp. 328-329.

In the present cases all of the testimony on behalf of the KOYEI MARU had to be presented by deposition; hence it is obvious that the trial court could have come to no valid conclusion as to the *relative* credibility of witnesses. In this situation, it is clear, under the foregoing authorities, that this court is free to examine this record and come to its own conclusions unembarrassed by the findings of fact made by the trial court.

This court in the recent decision of

The Ernest H. Meyer, 84 F. (2d) 496,

takes the view that these rules are substantially unaffected by Admiralty Rule 46½ and that while findings of a trial court may be regarded as presumptively correct, they may be rebutted and where clearly against the weight of the evidence may be disregarded on appeal. The same case points out that where the evidence is taken largely by deposition, the findings below carry a presumption in their favor of lesser weight and may more easily be rebutted.

See also to the same effect

Thomas et al. v. Pacific Steamship Lines, 84 F. (2d) 506,

another decision in which this court adheres to the principle that in an admiralty appeal the entire evidence is to be reviewed and given independent examination, thought and judgment.

Indeed, a decision of a trial court on questions of fact should, we think, be held to be of less binding force than was the situation in the case of an opinion actually written by a trial court before the adoption of Rule 46½ of the General Admiralty Rules. Since that rule, it has unfortunately become the practice for trial courts, instead of writing their own opinions, to adopt the state court practice of having counsel for the prevailing party prepare detailed findings on every issue (of course favorable to his own client and adverse to his opponents) which has created a tendency on the part of trial courts to sign such findings as presented by the successful party without amendment or variation.

B.

The Faults of the David P. Fleming and Her Scows Are Apparent From the Record and Require a Reversal of Decrees.

It is submitted that a review of the record in these cases can lead only to the conclusion that the action of the trial court in exonerating the DAVID P. FLEMING and her scows from all contributory fault must be reversed. The faults of the DAVID P. FLEMING and her scows are demonstrable, as well as the fact that they all contributed to the collision. These matters, as we have indicated in our specifications of errors, *supra,* will be discussed under three headings.

1. With an Extremely Hazardous and Dangerous Tow Occupying Nearly Half a Nautical Mile of Sea Room the David P. Fleming Failed in Many Respects to Take the Extraordinary Precautions Which, Under the Circumstances, Were Required of Her.

It has been seen that the undisputed evidence and the admissions in the pleadings establish the fact that the distance from the stem of the DAVID P. FLEMING to the stern of the last scow was approximately 2825 feet.

The District Court was impressed with the "obvious view * * * that a tow of half a mile in length is a menace, more or less to navigation." [Ap. p. 597.] But he felt himself powerless to do anything about it in the absence of some law or regulation expressly making such tows unlawful. Where the court fell into error was when he assumed that the matter ended right there. He completely disregarded the rule, repeatedly laid down by the decisions, that tows of this character are to be charged with the very highest degree of care, and he utterly ignored the many respects in which the tug fell far short of meeting those requirements.

It might be well, at the beginning of this discussion, to review a few of the great number of cases laying down the rule that while exceedingly long tows of the character involved in the cases under review are not *per se* unlawful, they will be held, particularly in frequented waters, to an extraordinarily high degree of care. It was pointed out in

The H. M. Whitney, 86 Fed. 697, 701 (affirming 77 Fed. 1001),

condemning a tug and tow a quarter of a mile long for proceeding in a fog in a narrow channel:

> "Whether the navigators who undertake such experiment do or do not violate some particular provision of the sailing regulations, they certainly expose their fellow navigators to a greatly increased risk, unnecessarily; and for a collision resulting from such action they should be made to respond. Navigating in crowded waters, with essentially hazardous fleets, they should, in the language of the court of appeals in the First Circuit, 'be held to the extremest care.' And certainly in the case at bar the care exercised was far short of 'extreme.' "

The same principle is reiterated in

The Gladiator, 79 Fed. 445, 446,

wherein the court said that while long tows of the character considered in these cases cannot be condemned as absolutely unlawful,

> "yet we must hold tugs which navigate this coast with such long and essentially hazardous fleets to the use of the extremest care in the interests of common safety."

In a series of cases involving a collision between the *Charles F. Mayer* and the *Admiral Schley:*

> *Consolidation Coal Company, Ltd., v. The Admiral Schley* (District Court, Mass.), 115 Fed. 378;
>
> *The Admiral Schley* (C. C. A. First Circuit), 131 Fed 433 (affirmed on rehearing, 142 Fed. 64);

the rule was reaffirmed that a tug with a long tow must be held to the use of extraordinary care in the interests of common safety, and a steamer with two coal barges in tow, comprising a flotilla 2300 feet long, was held at fault for maneuvering in the fog between Boston Harbor and the lightship while waiting for the fog to lift and enter the harbor, instead of standing out further to sea or otherwise keeping out of the known track of outgoing vessels.

In

> *The Howard,* 253 Fed. 599 (affirmed as *The Charles F. Mayer,* 256 Fed. 987—mem. dec.),

while an overtaking steamer which ran into a barge was held at fault, the tug was also held at fault for not sounding danger signals and for failing to keep course and speed but, on the contrary, slowing down on the theory that the overtaking steamer would probably pass over the hawser in safety.

On the subject of long tows, the court says:

> "I do not for a moment wish to minimize the importance of strict adherence to the rules requiring the use of short hawsers. As already stated, there was half a mile between the bow of the Mayer and the stern of barge 17. Tows of such length are doubly dangerous. They close for the time being

a great stretch of water to other vessels, and it is exceedingly difficult for a tug with such a tow so to maneuver as to do its part in escaping from dangerous situations, or from situations which may easily become dangerous. The exercise of extreme care is, under the circumstances, incumbent upon it. The Admiral Schley, 131 Fed. 433, 65 C. C. A. 417."

See also,

The Samuel Dillaway, 98 Fed. 138;

The Bee, 138 Fed. 303;

The Gladys, 144 Fed. 653;

The Plymouth, 186 Fed. 105;

The Mary E. Morse, 179 Fed. 645;

and

The Helen, 204 Fed. 653.

All of the above cases reiterate the rule that where long tows of this character are being employed they must be held to an extremely strict observance of all precautionary measures.

Can it be contended that the David P. Fleming complied with these extraordinarily severe standards? To this question the record provides an emphatic answer in the negative. There are at least three particulars in which the David P. Fleming conspicuously failed to take the precautions which, under the law applicable to tows of this character, were required of her.

(a) The David P. Fleming Was Negligent in Failing to Post Any Lookouts or Attendants on the Scows.

It is conceded that the scows were not manned by any one. In the somewhat picturesque language in which the memorandum of Third Mate Takahashi was translated:

> "On the scow no person or no shadow of a person, not a voice of a person, not any one aboard. Or you might say no person." [Ap. p. 576.]

Evidence was offered and the court made a finding to the effect that it would have been impractical and dangerous to station a lookout or bargeman on the scows and that it was unnecessary to station them on the scows. The witness Johnson testified that on the scows when loaded, in bad weather, there being no accommodations for a man on the scows, he might get washed overboard. [Ap. pp. 199 and 200.] On cross-examination, however, this witness testified that when the barges are empty they had nine or ten feet of freeboard. [Ap. p. 203.] He admitted that there was nothing about the weather that night that would have endangered the safety of anybody on board those scows. [Ap. p. 204.] Captain Jacobsen also stated that, in his opinion, it wouldn't be a safe practice to put men on the scows in rough weather [Ap. p. 502] but on cross-examination [Ap. p. 507] it developed that his opinion was based largely on the proposition that these scows were not constructed in such a manner to afford shelter for an attendant and he also admitted that he had no personal experience as to how these scows would act in a seaway. [Ap. p. 508.] He stated further "that it would be all right to have an attendant if you had scows big enough to have a man on." [Ap. p. 510.]

He also answered, in response to a question of the court [Ap. p. 512] that he did not know anything about the towing part, never having been on a sea-going barge. Even Mr. Connor (the superintendent for Wilmington Transportation Company), who was, of course, at pains to attempt to justify his company's practice in this regard, admitted that it would be possible to construct a scow on which it would be safe to put people aboard. [Ap. p. 590.] The further argument was made as we have indicated, by some of the witnesses that men on the scows would not have done any good and it was, therefore, unnecessary to adopt the practice of posting lookouts or attendants on them. This is demonstrably absurd. It is self-evident in this very case that if men had been posted on these scows, they could have found out and corrected whatever was wrong with the light on the first scow; or if the men had been given a lantern that could have been waved, or a flare that could have been set off to attract attention, or as a last resort, provided with means whereby the hawsers could have been cut, this collision, in all probability, would have been avoided.

There is no reason apparent from the record why lookouts could not have been posted on these scows, at least until they were safely away from the congested water near the entrance to Los Angeles Harbor. It is freely admitted by the master of the tug, as has been pointed out, that there would have been no danger at all to attendants on the scows under the conditions prevailing that night. Nor would it be any excuse for a failure to take this

obviously sensible precaution that the scows were not provided with facilities for shelter to an attendant. For all that appears, on these big scows, adequate shelters could have been constructed at a nominal cost, but even if they couldn't, the tug had no business putting to sea with scows so constructed. The courts have frequently condemned barges for being without adequate lookouts.

In

The Mount Hope, 79 Fed. 119 (affirmed 84 Fed. 910),

the owners of a barge sought to recover for the loss thereof against a schooner whose close proximity compelled the attendants in charge of the last of three barges in tow to cut it adrift to avoid collision with the schooner, the barge being lost. It appeared that the barge was unequipped with any efficient means of signalling to the tug the fact that it was in distress. The Circuit Court of Appeals, affirming the decision of the District Court that the schooner was free from fault, says:

> "But this appeal has another aspect of more importance. Here was a tow, extending nearly two-thirds of a mile, and therefore of very great length, even for tows of this character. In The Berkshire, 21 C. C. A. 169, 74 Fed. 906, 910, we held that it was beyond our province to condemn tows of this class generally; but in The Gladiator, 25 C. C. A. 32, 79 Fed. 445, while affirming what we thus said, we remarked that we must hold them to extreme care. *It was clearly a violation of this requirement for a tug and tow, covering so great a distance, to go to*

sea without some efficient means of communication from one to the other in emergencies, and the continued separation of the barge from the steamer in this case is to be attributed to the disregard of this reasonable precaution. These conclusions render it unnecessary to consider any other question raised on this appeal. The decree of the district court is affirmed, and the costs of this court are adjudged to the appellee." (Italics ours.)

Here with no one on the scows there was certainly "no efficient means of communicating from one to the other" or to anyone else.

Another case directly passing on the necessity of a lookout on a tow of this character is

The America, 102 Fed. 767.

In this case a tug had three tows in single file on hawsers of over 1000 feet in length. The tug failed to change its course in time to avoid a collision between one of the tows and an anchored vessel. The tug was held at fault but the tow was also for failure to adopt means, such as cutting the hawser, which might have prevented the collision. In the language of the court:

"A tow on so long a hawser, navigating a much frequented channel, where water craft of all descriptions, moving and lying by, are liable to be encountered, should be provided with the means of severing her hawser in case of an emergency rendering that necessary. Whether the Indian Ridge was thus equipped does not appear. If she was not she

should have been, and if she was she incapacitated herself from using them by her own neglect. She did not see the Suzanne until it was too late to cut a hawser or to do anything else to avoid her. *The failure to have a lookout by a tow may, under some circumstances, be culpable* (The Virginia Ehrman and The Agnese, 97 U. S. 315, 24 L. Ed. 890), and we think the present to be one of the cases in which it should be held to be so. Tows, like other vessels, must exercise ordinary skill and vigilance, and, while being navigated in greatly frequented waters, are bound to use care and precautions commensurate with the increase of risk of collision from the greater number of craft likely to be met. A tow, using in such waters a hawser one-sixth of a mile long, ought to anticipate that contingencies of navigation may require her to rely on her own precautions for her own safety and the safety of other vessels, and not depend exclusively upon those which may be exercised by the tug. We think the court below should have apportioned the loss between the Indian Ridge and the America, and decreed in favor of the libelant against both." (Italics ours.)

And see

The Gertrude, 118 Fed. 130,

where a tow was held at fault for being undermanned. If that is a fault, certainly being unmanned is a graver one! Allowing a tow of three vessels to trail off for a half mile at the entrance to a busy harbor in the night time without anyone on the scows constitutes a shocking and flagrant disregard of the safety of all others navigating those waters.

(b) The David P. Fleming Was Negligent in Not Using Her Searchlight at an Earlier Time to Light Up the First Scow.

Captain Johnson of the tug testifies that he blew a danger signal to the Koyei Maru to warn that vessel that there was danger ahead on the course that she was on; that he blew a second one about a minute later and the third signal about a minute and a half after that. [Ap. pp. 161-163.] He claims that it was only after the third danger signal was blown that the Koyei Maru started to reverse. He then turned on his searchlight which had the effect of lighting up the first scow. [Ap. p. 164.] No one on the Koyei Maru heard any of these alleged danger signals but the testimony as to when the searchlight was played on the scow is in agreement with that of Captain Johnson. Captain Watanabe states that he put his engines full astern at 2:06 and that just after he blew his three blasts and turned his vessel hard to the left, the searchlight was played on the dark object which proved to be the first scow in tow. [Ap. p. 347.] The third mate of the Koyei Maru also testified that this searchlight was used at 2:06. [Ap. p. 437.] As will be discussed more fully later, we think the David P. Fleming's witnesses must be mistaken, at least as to the time that these alleged danger signals were blown, but accepting the testimony at its face value, it must have become apparent to Captain Johnson long before he used his searchlight that neither his lights nor his signals (if blown) were

effective in warning the KOYEI MARU of the presence of this half-mile-long obstruction in that the Japanese vessel continued to head directly for the first of the scows in tow. Captain Johnson testified that he watched the KOYEI MARU approach this scow for two minutes and a half without (he says) any apparent change of course or speed. [Ap. pp. 162-163.) Had the tug turned her searchlight on that scow even a minute earlier, in all probability the collision would have been avoided. As it was, on the tug's own testimony, the searchlight was not used at all until after the KOYEI MARU had already discovered the presence of the first scow and reversed her engines and had indicated to the tug that she was so doing. It is difficult to understand what useful purpose was served by turning on the searchlight at this time. It was then too late to do any good but its timely use earlier might well have been the deciding factor in preventing this accident. Applying the extreme standards of care, which the authorities cited above have ruled applicable to tows of this character, it needs little argument to demonstrate that the DAVID P. FLEMING must also be held accountable for not taking this precaution at an earlier time.

(c) THE DAVID P. FLEMING WAS NEGLIGENT IN PROCEEDING UNNECESSARILY CLOSE TO THE ENTRANCE OF THE HARBOR.

Captain Johnson first attempted to place the location of the collision at a point approximately three-quarters of a mile away from the light at the end of the San Pedro

Breakwater [Ap. p. 167] but on cross-examination it developed that in his log book, written immediately after the event, the place of the collision was put at one-half mile off the breakwater light [Ap. p. 184] and Captain Johnson admitted that his best judgment right after the collision was that it was within half a mile rather than three-quarters of a mile. [Ap. p. 185.] Definite bearings were taken shortly after the collision on the KOYEI MARU. These bearings were set down on a chart which has been offered in evidence (KOYEI MARU Exhibit No. 3) and this fixes the collision as having occurred within approximately 2700 feet from the breakwater light. Captain Johnson freely admitted that there was nothing that would have prevented him that night from keeping further away from the breakwater light. [Ap. p. 193.] A glance at the chart of the harbor demonstrates that there was no necessity for the DAVID P. FLEMING taking this cumbersome and unwieldy tow as close as she did to the entrance of a busy harbor. She could easily have kept a mile away from the breakwater light. If she had kept away as much as three-quarters of a mile, the collision obviously would not have occurred, and here again it is submitted that the DAVID P. FLEMING was remiss in adhering to the standards of extreme care required of persons who undertake to navigate in congested waters with a tow of this hazardous and dangerous character.

2. The District Court Erred in Finding That the Admitted Statutory Faults of the David P. Fleming With Respect to Her Lights, Particularly Her Range Light, Could Not Have Contributed to the Collision.

For convenience of reference, we here quote certain articles from the International Rules for Preventing Collisions dealing with the lights of steam vessels under way.

"ART. 2. A steam vessel when under way shall carry—(a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breath, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light *so constructed as to show an unbroken light over an arc of the horizon of twenty points* of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(e) A steam vessel when under way may carry an additional *white light similar in construction* to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be *at least fifteen feet higher* than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

ART. 3. A steam vessel when towing another vessel shall, in addition to her side lights, carry two bright white lights in a vertical line one over the

other, *not less than six feet apart*, and when towing more than one vessel shall carry an additional bright white light *six feet above or below* such lights, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a), excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull.

Such steam vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam." (Italics ours.)

33 *U. S. C. A.* §§ 72, 73.

The collision occurred outside the outermost aid to navigation and, hence, is governed by the International Rules and it was stipulated at the trial that the International Rules are applicable [Ap. p. 129].

The undisputed evidence shows that the lights of the David P. Fleming violated the rules above quoted in at least three particulars:

1. Her towing lights were only three feet apart instead of six feet apart, as required by Article 3, *supra*. [Nixon, Ap. p. 231; Connor, Ap. p. 593.]
2. Her range light was only two or three feet higher than the masthead light, instead of there being a difference of at least fifteen feet, as required by Article 2 (e), *supra*. [Nixon, Ap. p. 231.]
3. Her range light, instead of being screened and thus "similar in construction" to the masthead light as

> required by Article 2 (e), was visible all around the horizon [Johnson, Ap. p. 173; Nixon, Ap. p. 231; Connor, Ap. p. 549], and indeed *Captain Johnson did not even know* that the rules required his range light to be screened. [Ap. p. 173.]

The David P. Fleming was thus guilty of three admitted statutory faults and under well-settled law she can escape liability in the present case only if she is able affirmatively to show not merely that these faults might not have contributed or that they probably did not contribute but that *they could not have contributed to the collision.* This rule is so firmly established an exhaustive discussion of the law seems unnecessary. The following decisions of the United States Supreme Court have been frequently cited in this regard:

> *The Pennsylvania,* 19 Wall, (86 U. S.) 125, 136, 22 L. Ed. 148;
>
> *Beldon v. Chase,* 150 U. S. 674, 699, 702, 14 Sup. Ct. 264, 37 L. Ed. 1218;
>
> *The Britannia,* 153 U. S. L53 U. S. 130, 143, 144, 14 Sup. Ct. 795, 38 L. Ed. 660,

and in

> *Lie v. San Francisco & Portland S. S. Co.,* 243 U. S. 291, 61 L. Ed. 726, 37 Sup. Ct. 270, 272

the court states the rule as follows:

> "But when, as in this case, a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the

disaster. In such case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes or that it probably was not *but that it could not have been.*" (Italics ours.)

This court has adhered to this rule in

The Princess Sophia, 61 F. (2d) 339, 347.

And in two cases entitled:

Puget Sound Navigation Company v. Nelson, 41 F. (2d) 356, 357. (Certiorari denied, 281 U. S. 869, 51 Sup. Ct. 76, 75 L. Ed. 768) and again on a second appeal in 59 F. (2d) 697.

these principles were applied to a failure on the part of a fishing boat to have proper lights.

It is, of course, no excuse that in two of the three violations referred to above the lights were in compliance with the Inland Rules. This subject was reviewed in

The Cherokee, 253 Fed. 851 (affirmed, mem. dec. 277 Fed. 1016).

In that case it appeared that certain scows were carrying white lights as the Inland Rules require rather than colored lights called for by the International Rules. It was suggested that it was a custom not to change the lights when the harbor lines were crossed. The court in this connection uses the following language:

"There remains, therefore, the fault of the Cherokee, which carried no side lights as prescribed. Some argument is made of the long custom not to change lights after crossing the harbor line. I need hardly say that no custom can avail against the statute.

Deep sea mariners need not charge themselves with local regulations outside of harbors. That is one reason for taking on pilots. They are not to be held to a knowledge that hand lanterns upon staffs indicate a tow in the wake of a tug. Looking for side lights, they will almost certainly be confused by the appearance of great numbers of tiny lanterns on the surface of the water, as was the case here, for a number of tows were following the Moran down. Whether the requirement to carry only side lights be onerous or not, it must be observed outside harbor limits; else entering vessels cannot possibly navigate to the harbor limits with safety. I cannot understand how this universal rule of the sea can be for a moment questioned.

Hence the scow can escape only on the assumption that her fault did not contribute. This position appears to me to be speculative. I do not believe that the scow was blanketed by the Cerberus, as the Hugo supposes; but, if she had carried regulation side lights, the steamer might have seen them, or might not. Who can say beyond a reasonable doubt that she would not? Mr. Brown seizes upon certain passages in Hansen's deposition to show that he said it would have made no difference. These do not give a fair understanding of his meaning. What he said was that lights like the hand lanterns, if carried as sidelights, would have been worse than the lanterns themselves. That I can well believe, but it does not follow, and he is careful to insist that it did not follow, that regulation side lights could not have helped. It is true that he did not see the Moran's green light, and the chances, perhaps, are that he would not have done better with the Cherokee's, if she had carried one; but how can it be asserted beyond peradventure? Under the accepted test for

violations of statutory rules, I must give the Hugo the benefit of the doubt, and hold the Cherokee at fault with the tugs. Certainly the Hugo was looking for a green light on the possible tow, as well as on the tug."

It is submitted that in the light of the record in this case it is altogether impossible for the DAVID P. FLEMING to contend that her gross faults with respect to her lights could not have contributed to this collision. Possibly this is true with respect to the fact that her towing lights were only three feet apart instead of six feet, as it is doubtless the fact that when the KOYEI MARU commenced to navigate with reference to the tug, the Japanese vessel was at least two points abaft the tug's beam and the towing lights were consequently not visible; but as to the other two violations, so far from showing that they could not have contributed to the collision, the evidence conclusively demonstrates that there was a direct and immediate causal connection between these violations and the disaster.

At four minutes after two, Captain Watanabe observed a blur of white light slightly on his starboard hand and, as we have related, reduced his speed from half ahead to slow ahead and after starting to turn to the right, but getting no response to his whistle signal, concluded that the safer course was to go under the stern of this vessel. Two minutes later, that is to say, at 2:06, after carefully noting that the blur of white light to the right was broadening on his starboard hand, he observed that this blur resolved itself into two white lights, one above the other, and he also saw, slightly to the right of the two white lights, a faint flicker of a green light, (obviously because

the tug must have swung to the westerly just long enough to open up the starboard light and immediately back again, shutting it out). At substantially the same moment he descried this dark object almost dead ahead. He assumed, of course, that the two lights, one above the other which he observed to his right, particularly in connection with the green light that momentarily became visible indicated, under Article 3, *supra,* a tow of only one vessel. [Ap. p. 355.] He accordingly rang up full astern, ordered his rudder hard left and shaped his course to go under the stern of the single scow he saw and which the lights on the tug told him was the only scow in tow. At that time the lights on the second and third scows were still not clearly discernible as colored lights and there appeared to be no reason why he could not safely cross ahead of them. The tug's *two* white lights in effect said: "Those lights to the left have no connection with me, as I have but one scow in tow." Moreover they were on his port hand and *prima facie* bound to keep out of his way. At about eight minutes after two he realized that the tug's lights had not spoken the truth and there were apparently two more scows in tow; that in order to avoid striking the tow line he would have to pull up his vessel short of the course of the entire flotilla. He, therefore, immediately dropped his anchor and while he almost succeeded in averting the collision, it was not quite possible to avoid striking the tow line with the resulting damage to both vessels.

It seems apparent that if Captain Watanabe had not been misled by this range light which coupled with the stern light gave the appearance of towing lights, he might well have dropped his anchor at six minutes after two instead of two minutes later and thus avoided a collision. At least it does not lie in the mouth of the DAVID P.

FLEMING to say what Captain Watanabe would or would not have done. *If there is any possibility that he might have dropped his anchor if he had not been misled by the* FLEMING'S *improper lights, the tug must respond for her admitted fault and be chargeable with having caused or contributed to the collision.* It is conceded by the witnesses for the FLEMING that when looking from astern of the tug the range light and the stern light would show two lights, one above the other, and would be, of course, easily mistaken for towing lights.

If the range light had been fifteen feet higher, as it should have been under Article 2 (e), it would have looked less like a towing light and would have been much less misleading. That also must be put down as a contributory fault.

The findings signed by the court to the effect that Captain Watanabe did not see the tug's green light; that the defective range light was a positive benefit to the KOYEI MARU; that the defective range light could not have misled the KOYEI MARU and that at 2:06 the collision was already inevitable, are all utterly unwarranted and contrary to the undisputed evidence.

The contention that Captain Watanabe could not have seen the green light is, of course, based on the proposition that at 2:06 the KOYEI MARU was too far abaft the tug's beam to see it. This would be true, assuming the light was properly screened and assuming further that the tug was, as she claims, on a course of south, magnetic, and was steadily holding that course. If, however, the heading of the tug was farther to the west, as the Japanese

officers testify was apparently the case, there would be more chance of the green sidelight becoming visible—at least for an instant. Moreover, it must be remembered that these heavy scows had been brought over from a point very considerably to the east of the tug's position at that time and it is more than likely that they still were tailing somewhat off to the easterly, exerting a constant pull on the stern of the tug tending to swing her stem to the west and thus make her green sidelight visible. A review of the testimony of the witness Nixon, who was supposed to be steering at the wheel, indicates that the witness instead of paying attention to his business of watching his compass and his heading was observing everything, both to his right and left, as well as astern. It is more than likely that he permitted the tug to swing off her course on one of the many occasions when he must have been gazing astern of him if his own testimony is to be believed. Certainly, there is nothing to refute the positive testimony of Captain Watanabe that he saw the tug's green light and that of the second mate Honda to the same effect. [Ap. pp. 355, 405, 417, 419 and 566.] The fact that the green light was seen only as a faint flicker seems to indicate that the tug turned momentarily just enough to open up that light an instant. The slight difference in the bearing of that light and the tug's real towing lights as well as the possibility of there being some difference in the angle of their screens would easily account for the fact that the tug's three towing lights were not seen at the same brief moment the green side light was visible. There is no question whatever that the two white lights *were* observed in a vertical line, which obviously resembled towing lights and it is submitted that

even if Captain Watanabe was mistaken in thinking he saw, in addition, the green light, this would make no difference so far as the culpability of the FLEMING is concerned. Even if the Captain *thought* he saw the green light, the FLEMING would still be held in fault, as there is no doubt from the uncontradicted evidence that Captain Watanabe *was* misled by the defective range light.

To argue that at 2:06, the collision was inevitable is simply foolish. As it was, the KOYEI MARU came very close to avoiding the collision altogether, and had her anchor been dropped two minutes earlier, it is obvious that the collision would not have happened. In the three minutes between 2:06 and 2:09 the KOYEI MARU traveled about 1050 feet, an *average* speed of three and a half knots. She must necessarily have been virtually at a standstill when the collision occurred. The finding of the court that she traveled 1200 feet in this three minutes is based on a rough estimate as to the place of the collision rather than on the testimony as to bearings which places it with a fair degree of accuracy.

The suggestion is made by one of the witnesses that sufficient anchor chain was not let out. This witness (Captain Jacobsen) in the first place assumed that there were sixty feet of water at the place of collision when the chart shows a maximum of fifty-two feet, and next proceded to state that putting out ninety feet of chain would not have much effect in retarding speed if the engines were not backed. [Ap. p. 501.] On cross-ex-

amination, while he admitted that the slower the vessel is going, the more effect it would have, then admitted that he was not familiar at all with the KOYEI MARU and knew nothing about her backing power. [Ap. pp. 501, 504.] This testimony fails utterly to justify the court's finding that the amount of anchor chain put out by the KOYEI MARU (after she had been backing for two minutes) was insufficient or the finding that the depth of water at the point of collision approximated sixty feet. In any event, it affords no basis for the suggestion that the collision was inevitable at six minutes after two.

Indeed, it appears from the opinion delivered by the court from the bench [Ap. pp. 598, 599] that the court was apparently of the view that the lights of the tug *were* misleading. It is impossible to understand the reason for the court's finding that the defective range light did not contribute to the collision. He seemed to be laboring under the impression that the KOYEI MARU's contention was that it was misled as to the tug's *direction.* The court also seemed to hold that the FLEMING could be held at fault in regard to these improper lights only in the event the KOYEI MARU was entirely free from blame. Our position is that the KOYEI MARU *should* be exonerated, but even if the court disagrees with us on this proposition and holds the KOYEI MARU at fault in any particular, the DAVID P. FLEMING must also be held accountable for her violations of the rules in respect of lights, if for no other reason. No other result is possible on this record.

3. The District Court Erred in Not Finding That the Lights on the Scows, Particularly Those, If Any, on the First Scow, Were Inefficient and Defective.

The testimony of the witnesses on behalf of the DAVID P. FLEMING is admittedly quite definite that lights were placed on all three of the scows and could be seen from the tug itself. It is rather too definite to be thoroughly convincing. There is no apparent reason why this night should be different from any other night as regards the care taken in inspecting and fixing lights and it is particularly difficult to understand how it happens that the helmsman, whose sole duty it was to keep the tug properly on her course, would be spending so much time looking backward in order to observe the lights on the scows.

While it is true that they were not identified as green running lights until three or four minutes after they were first seen, the starboard lights on the second and third scows were undoubtedly fixed and burning at the time of the collision *but at no time was any light on the first scow seen by any one on the* KOYEI MARU. Indeed, when the master slowed his engines for the express purpose of determining what was the apparent movement of the craft ahead and carefully watched the lights broaden to the right and left of his vessel respectively, he was heading at that very time directly for the first scow. It is simply incredible that he would have navigated as he did if the starboard light of the first scow had been visible. When that scow was lit up by the tug's searchlight careful scrutiny of it by all of the deck officers of the KOYEI MARU revealed no light visible [Hata, Ints. 40 to 42, inclusive, Ap. p. 42; Watanabe, Ap. p. 347; Takahashi, Ap. p. 437; Honda, Ap. pp. 568, 569.] The

only explanation that can be made of the fact that no lights were at any time seen on the first scow when those on the second and third scows were visible is that the running light of the first scow, at least so far as concerns the side of it that was presented to the KOYEI MARU, was either invisible or too dim to be seen farther than a very short distance. If we assume that the light on the first scow *was* seen by the KOYEI MARU, we must also make the violent assumption that the master deliberately and intentionally tried to run into it.

It is not at all impossible that the green running light on the scow *was* visible ahead and *not visible* to the KOYEI MARU. Many things might cause this. The screen may have been defective. There may have been some obstruction. The glass may have been smoked on the side toward the Japanese vessel and remained clear on the side toward the tug so that it could be seen ahead but not out to the side.

As might be expected, the decisions on the subject of the relative weight to be given testimony that lights were visible to one vessel and that they were not seen by the other are not entirely harmonious, and in the last analysis the court's conclusions must be based on all the circumstances in the case to determine where the greater probability of truth lies. Ordinarily, the only evidence that can be produced to the effect that lights were missing or defective is the testimony of persons, who were in a position to observe, that they did carefully look and that they did not see the lights. There is a long line of cases which holds that such evidence is persuasive that the lights were not burning properly. There is also, it is freely conceded, a large number of cases to the general

effect that positive testimony that lights were fixed and burning must normally outweigh negative testimony that they could not be seen. The fact that lights on the tug and on the second and third scows *were* seen tends, we submit, to support the contention that something must have been wrong with the lights or, at least, the green light on the first scow. It would seem that it is only reasonable, if possible, to reconcile this testimony and it is certainly within the bounds of probability that the side of the light presented to the KOYEI MARU by the first scow may have been screened off, obstructed or blackened by smoke or soot without obscuring the portion of the glass on the lantern visible from the tug. The decision of Judge Addison Brown in

The Monmouthshire, 44 Fed. 697,

although by no means the earliest case on the subject is illustrative of what we have in mind. In this case five witnesses from the steamer who were actually on watch at the time and four other witnesses all testified that they could not see any light on the approaching bark. The captain of the bark, on the other hand, states that his lights were properly burning; that when he observed the steamer's lights a good distance off, he got up on the rail, leaned over and verified this fact. In the language of the court:

> "It is not credible that so many persons on watch should for 10 minutes not see a light ahead, if it were such a light as the regulations require, and not

obscured. In many similar cases it has been held that when several persons on watch, apparently attentive to their duties, can see no light during such a considerable period, when it ought to be seen, the defect will be ascribed to the other vessel, *even when the precise reason why the light is not seen does not appear. The Narragansett,* 11 Fed. Rep. 918; *The Royal Arch,* 22 Fed. Rep. 457; *The Alaska,* Id. 548, 551; *The Sam Weller,* 5 Ben. 293; *The Westfield,* 38 Fed. Rep. 366; *The Drew,* 35 Fed. Rep. 789. Still more, when there are circumstances such as exist in this case, viz., the lights being set far aft, and low down, and the vessel listing to starboard, that might cause the lights to be obscured. *The Johanne Auguste,* 21 Fed. Rep. 134, 140; *The Tirzah,* 4 Prob. Div. 33; *The Caro,* 23 Fed. Rep. 734." (Italics ours.)

In

The Circassia, 55 Fed. 113,

there was also conflicting evidence on lights. The court concluded in this case on the whole evidence that the failure on the part of apparently vigilant persons to see the light which, on the evidence, was burning and was proper must be attributed to the fact that the vessel's sails obscured the light and the sailing vessel was accordingly condemned. This decision is affirmed in an opinion reported as

The Daylight, 73 Fed. 878,

where the upper court held that temporary obscuration of the green light by the forestay sail is the only way to account for the failure on the part of the other vessel to see the sailing ship's lights.

To the same effect is

The Viola, 59 Fed. 632,

also a decision by Judge Brown which held evidence on the part of the lookout and captain that the other ship's lights could not be seen as persuasive that they could not have been burning properly at the time.

In

The Livingstone, 87 Fed. 769, 774,

the court reviewing a number of prior cases, held that the testimony of the crew of one vessel that the other's lights could not be seen was entitled to greater credence than the testimony of the other ship that the lights were burning.

The Lansdowne, 105 Fed. 436, 447,

sums up the matter as follows:

> "Where reputable witnesses, whose competency and experience in their calling is not questioned, testify that no light was visible, who were in a position to see if it was, whose interest, duty, and safety were involved in observing it, and where there is nothing to indicate negligence on their part, and a collision occurred which might easily have been avoided, and would naturally have been averted if the light had been visible and seen; when their testimony is opposed mainly by that of men having less favorable opportunities of knowledge of the fact in question, and which is quite consistent with the obscuration of a light by a cause which they were not in a position to observe; and where the testimony of one of the opposing witnesses, who was charged with the duty

> of opening the light, is apparently to his practice, rather than his recollection of the facts and of the time when he opened the light; and when the navigation of vessel charged with fault is shown to have been flagrantly negligent in other particulars,—the weight of evidence must be deemed to establish the light in question was either imperfectly displayed or was not seasonably shown. *The Drew* (D. C.), 35 Fed. 791; *The Livingstone* (D. C.), 87 Fed. 775; *The Monmouthshire* (D. C.), 44 Fed. 697."

See also

The Martha E. Wallace, 148 Fed. 94, 97.

A decision of the District Court for the Northern District of California,

The Pierre Corneille, 133 Fed. 604,

is of interest in this connection. The following quotation from the opinion (p. 606) sufficiently sets out the reasoning of the court on the point:

> "There is a marked conflict in the evidence upon the question whether the Larnaca before and at the time of the collision exhibited the lights required by law. The burden of proving that such lights were not exhibited is upon the Pierre Corneille. It satisfactorily appears that there was a competent lookout properly stationed on the Pierre Corneille, and he testified that the Larnaca was first discovered as a dark object on the water from one point to one point and a half on the port bow, and apparently half

a mile distant, and that he saw no lights on her. The master and pilot of the Pierre Corneille saw her at about the same time, and their testimony is, in substance, that they both observed her through glasses; that they did not see either of her side lights, and could not determine in what direction she was moving until it was too late to take effectual measures to prevent the collision. They also testified that they were able at the time to see the lights of different lighthouses within the visual range, and that, if the lights of the Larnaca had been set, and burning properly, they would have seen them; and it is clear from all of the testimony in the case that if lights were in fact exhibited upon the Larnaca they should have been observed by those on board of the Pierre Corneille. The master of the Larnaca, her lookout, second mate, and some of her seamen testify with great positiveness that her lights were set and burning clear and bright from the time the Pierre Corneille was first seen until the collision. In view of the sharp conflict in the evidence, it is difficult to reach any certain conclusion as to the actual fact in relation to the lights upon the Larnaca, whether they were exhibited or not; but after careful consideration it seems to me the finding should be in favor of the Pierre Corneille. She was coming into the harbor, and was under command of an experienced pilot, and it is not at all probable that she would have been navigated in the way she was if the starboard light of the Larnaca had been seen, for with that light in view the master and pilot of the Pierre Corneille

would have known that porting her wheel, as they did, and changing her course to starboard, would make a collision inevitable. But they did not see this light, and the most reasonable conclusion is that, if set at all, it was not supplied with sufficient oil, or for some other reason had become so dim that it was not visible for any distance. The language of Brown, J., in the case of *The Amboy* (D. C.), 22 Fed. 555, is particularly applicable to the question now under discussion and may well be quoted in concluding this opinion:

'The purpose of lights is to be seen. If they do not fulfill that office to ordinary observation, the vessel must be held in fault; and when several witnesses concur in testifying that the lights could not be seen in a situation where they ought to have been seen, and, more especially, where it appears that the persons in charge of another vessel maneuvered their own vessel in reference to the other, and that upon looking specially for colored lights, they could not see any, and actually navigated their own vessel in a way that would have been highly improbable had the colored lights been visible, the inference seems irresistible, and this court has often held, that there must have been some defect in the lights that ought to have been seen, but was (*sic*) not seen. *The State of Alabama* (D. C.), 17 Fed. 847; *The Alaska* (D. C.), 22 Fed. 548; *The Johanne Auguste* (D. C.), 21 Fed. 134, 140; *The Narragansett,* 20 Blatchf. 87, 11 Fed. 918; *The Sam Weller,* 5 Ben. 293, Fed. Cas. No. 12,290.' "

And see also:

The Virginian, 217 Fed. 604 (W. Dist. Wash.), affirmed C. C. A., 9th Circuit, 235 Fed. 98,

where, on conflicting evidence, it was held that the Strathalbyn's lights were defective in view of the testimony of the officers on board the Virginian that the Strathalbyn's signals were distinctly heard but that her lights could not be seen on a night that was dark and cloudy but free from fog. The court concluded that the Strathalbyn's lights must have been either so dim as to be visible but a short distance or placed in a position where their lights were obstructed or obscured by deck cargo or by rows of stanchions along the side of the deck load. This conclusion was reached despite evidence on the part of the Strathalbyn that the lights were burning brightly at the time.

The testimony with reference to the lights on the other scows leaves one with the conviction that they, too, could not have been of the required brilliance. At 2:04 when the lights on the second and third scows were seen, they appeared to be very faint white lights. [Watanabe, Ap. p. 343.] The third mate, Takahashi, did not see these lights at all until two minutes later at which time they also appeared to be faint white lights. [Ap. p. 436.] It was not until sometime after 2:06, perhaps 2:07, that Takahashi identified these lights as green lights. [Ap. p. 438.] Parenthetically, attention is called to the testimony of this witness, occurring on pages 438 and 439, to

show how utterly unfair is Finding 18 to the effect that third officer Takahashi observed these lights to be green *at* 2:06 A. M. Captain Watanabe was not able to identify these lights as green until approximately 2:08, or about a minute before the collision, when he immediately ordered the anchor dropped. [Ap. p. 348.] We are not unmindful of the fact that the DAVID P. FLEMING produced testimony regarding certain tests that were made with reference to the visibility of lights similar to those used on the scows. Such testimony is obviously of very little value. The experiments were purely *ex parte* and, in the nature of things, it is altogether impossible to reproduce conditions exactly as they were at the time of the collision, both with respect to factors regarding visibility and the condition of the lamps themselves, *e. g.*, how far the wicks were turned up, how well they were trimmed and how clean the glass was.

There are several statements in the cases to the effect that experiments carried on with reference to visibility of lights, etc., are entitled to very little weight, particularly when the opposite side is not notified or invited to be present for the reason that it may well be altogether impossible to duplicate conditions that occurred at the crucial time. See on the general subject:

The R. R. Kirkland, 48 Fed. 760;

The Richmond, 114 Fed. 208, and

The Dorchester, 163 Fed. 779.

In all of these cases certain experiments were made with lights and in each instance the court said the evidence was entitled to very little weight, as the experiments were not made in the presence of the opposite party and that the difficulty of properly duplicating the conditions under which the test was carried out was manifest.

The preponderance of the evidence is clearly to the effect that the lights on all three scows were not of the required brilliance. They should have been seen as *three* sharply defined green lights, not as *two* dim colorless lights. As they were at all times within a distance of less than a mile, they could not have been of the brilliance required by the International Rules, i.e., a visibility of at least two miles.

Whatever conclusion is come to with respect to the lights on the second and third scows it is submitted that no reasonable deduction can be made from the entire record other than that for some reason the green light, at least, on the first scow was either obscured altogether so far as concerns the side of it presented to the KOYEI MARU or was so dim as to be altogether useless. On either theory it is a fault chargeable to the DAVID P. FLEMING as the tug assumed the responsibility of fixing proper lights on all of the scows and it certainly was a fault directly contributing to the collision. It is incredible that the KOYEI MARU would have been navigated in the manner in which she was if a proper running light had been burning on the first scow.

C.

The Alleged Faults of the Koyei Maru.

While the findings of fact and conclusions of law are very voluminous and hold the KOYEI MARU guilty of every charge of fault made by Wilmington Transportation Company in its libel, these charges of fault can be broken down into and will be briefly reviewed under five main headings.

1. The Evidence Shows That the Koyei Maru Was Not Chargeable With Anything That Would Reasonably Give Her Notice That She Was an Overtaking Vessel With Respect to the Tug and Tow.

The first specification of fault is that the KOYEI MARU commencing, as she did, to navigate with reference to the tug and tow when she was two points, or a little more, abaft the beam of the tug was an overtaking vessel as respects the tug *and* tow, and, hence, in fault for failing to keep out of the way. In the first place, whether this case presents an overtaking situation or a crossing situation is a matter not altogether free from doubt. There are authorities that indicate that tug and tow for purposes of applying the rules of navigation must be regarded as a single vessel. Logically, if this theory is adopted, we are dealing here with a vessel 2900 feet long and the beam of such a vessel should, in all fairness, be measured from a point midway between the stem of the tug and the stern of the last scow. Such a test was, in fact, applied in

The Gladys, 135 Fed. 601,

where the court considering a collision between a schooner and one of three barges in tow of a tug in determining

whether the schooner was an overtaking or a crossing vessel says:

> "We have not the tug's testimony, so cannot determine from her point of view how far abaft *her own beam* the schooner may have been at any time, but regarding the tow as one vessel, some two-thirds of a nautical mile long, the schooner was certainly never, after the vessels sighted each other, *two points abaft the beam of such vessel.*" (Italics ours.)

On this basis, we do not have an overtaking situation at all, but a crossing situation.

On the other hand in

The Charles C. Lister, 182 Fed. 988,

the court apparently decided that a schooner was an overtaking vessel with respect to a tug and some barges solely on the basis that the side lights of the *tug* were not visible to the schooner. The question is perhaps of not very great importance because it is obvious that if the KOYEI MARU were reasonably charged with notice of the presence of this extraordinarily long tow, even if it were a crossing situation, she would not have been justified in holding her course and speed, because had she done so, the tug could not possibly have gotten this unwieldy tow out of the way by her action alone. The case presented here is, therefore, really one of special circumstances, even though the relation of the two vessels, as a matter of strict logic, should properly be treated as a crossing case in which event the tug and tow would be regarded as the burdened and the KOYEI MARU as the privileged vessel.

The question as to whether the KOYEI MARU was at fault in this situation must be tested only by what was apparent to her when she commenced to navigate with reference to the DAVID P. FLEMING. What she would have seen if the lights of the tug and tow had been proper, were a single white light to the right, a green light dead ahead, a second green light two points on the port bow and a third green light four points on the port bow. She actually saw a confused blur of white light to the right, nothing whatever ahead, and two very faint white lights well to the left. What possible warning could she get from *that* combination of lights that she was confronted with a tug and tow? To charge the KOYEI MARU automatically with fault on the theory that she was an overtaking vessel is simply absurd. The Japanese vessel must be charged solely by what the situation looked like to her at the time. She cannot be condemned on the basis of what we now know about the situation. What she saw then is not enough to charge her with fault.

Nor was she properly charged with any other notice. The court made a finding that the Pilot Jorgenson saw lights ahead which he recognized to be the lights of a tug and tow bound from the Long Beach breakwater to Catalina Island and that the tow that Captain Jorgenson saw was the DAVID P. FLEMING and the three scows. This finding is altogether unjustified by the evidence. The guilty conscience of this witness became perfectly apparent on cross-examination. On his direct examination he was willing deliberately to leave the impression that he called the captain's attention to the fact that there was a rock tow out ahead but on cross-examination when confronted with his contrary admissions made immediately

after the collision this witness testified [Ap. pp. 307, 308]:

"Q. Now, as a matter of fact you are not absolutely clear, are you, Captain, that you talked about rock barges or tows to the Captain of the 'Koyei Maru'?

A. *No, I am not, because, as I say, I was not sure it was a tow. To me it looked like a tow, and it might have been fishing boats.*

Q. And it is quite possible that you didn't discuss rock barges or scows with the Captain?

A. It may be that I didn't. They get the hydrographic bulletins on all those Japs.

Q. As a matter of fact, you don't know whether you discussed it or didn't discuss it?

A. No.

Q. And when you say you think this was either a fishing boat or a tow, and it might have been a tow, you are relying to a very large extent on your local knowledge of conditions?

A. Well, yes."

He also stated on his direct examination that the Captain dismissed *him* when the vessel got abreast of No. 2A buoy. On cross-examination while at first he was definite, on being pressed, was only "pretty sure" that he did not tell the Captain of the KOYEI MARU that everything seemed to be all right and that he was tired and *wanted* to be relieved. [Ap. p. 308.] Captain Watanabe testified to that effect unequivocally. [Ap. pp. 341, 368.] There is nothing in the record, therefore, from which any deduction can be drawn that the pilot in any way assisted Captain Watanabe in learning of the possible presence of tows of this unusual length.

A notice was supposed to have been sent out by the hydrographic office some months before at the request of Wilmington Transportation Company and it has been stipulated that Nelson Steamship Company, the vessel's then agent, were on a mailing list which was apparently used the preceding August but it has also been stipulated that a thorough search of the files of Nelson Steamship Company failed to reveal a copy of the notice and that no one now alive in that organization recalls having seen such a notice. [Ap. p. 326.] Moreover, the officers of the KOYEI MARU testified definitely that they had no prior notice.

2. The District Court Erred in Charging the Koyei Maru With Fault for the Failure to Stop Her Engines at 2:04 A. M.

This charge of fault is governed largely by the same considerations that have just been reviewed above. If the KOYEI MARU had been charged with any notice of the presence of the first scow, it may well be conceded that it would have been more prudent for the KOYEI MARUI to stop her engines rather than simply to reduce her speed from half ahead to slow ahead: but if the officers of the KOYEI MARU are to be believed (and it is submitted the record can allow no other deduction) in their testimony that no light could be seen from the first scow at all, then it is entirely unreasonable to charge the KOYEI MARU with fault on this score. As the situation appeared to the KOYEI MARU at the time there was over 1950 feet of clear space between the light visible on the starboard hand and the first dim light which could be seen on the port hand. The KOYEI MARU reduced her speed, and carefully watching the bearings of the two lights observing that those on the

starboard hand broadened to the right and those on the port hand to the left was not apparently encountering a situation where there was any risk of collision. The general provision of Chapter 4 of the International Rules provides:

> "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

Measured both by the foregoing rule and by the tests laid down in the decisions, Captain Watanabe was justified in assuming that he was perfectly safe in going between the two lights one-third of a mile apart, when careful observation showed him that the bearings did appreciably change as he proceeded on his course.

In

> *The Scotia,* 14 Wall. (81 U. S.) 170, 20 L. Ed. 822,

the steamer Scotia collided with the sailing ship Berkshire. When the Berkshire was first discovered she was carrying only a white light at her bow fastened to her anchor stock and raised about four feet. The bearing of this light changed appreciably after it was first observed by the Scotia and that vessel held her course and speed until suddenly the light began to close in again on the steamer's bow when for the first time it was realized there was any apparent danger of collision. The Scotia's helm was

immediately ported and in quick succession orders were given to half speed, slow and reverse but, notwithstanding these orders, the vessels came together and the Berkshire was sunk. The Supreme Court discussing the contention that the Scotia was at fault in not stopping and reversing at an earlier time uses the following language which is peculiarly applicable to the situation at bar:

> "Was, then, the Scotia in fault? If she was, the fault must have been either that she did not change her helm sooner, or that she ported, or that she was unjustifiably late in slacking her speed and reversing her engines. No other fault is imputed to her. We have already said that she was not bound to take any steps to avoid a collision until danger of collision should have been apprehended and we think there was no reason for apprehension until the ship's light was seen closing in upon her. Assuming for the present that she had no right to conclude that the light was on a steamer and to maneuver accordingly and, therefore, that it was her duty to keep out of the way, *it is still true that all her duty at first was to watch the light in order to discover certainly what it was, and to observe its course and notice whether it crossed her own course. It is not the law that a steamer must change her course, or must slacken her speed the instant she comes in sight of another vessel's light, no matter in what direction it may be.* With such a rule navigation cannot be conducted. Nor is such a rule necessary to safety. It is, therefore, no fault that, seeing the ship's light off her port bow, apparently at a distance of several miles, the Scotia continued on her course without slackening her speed, until that light began to close in upon her." (Italics ours.)

In

The Sarmatian, 2 Fed. 911,

it is pointed out that a vessel is not bound to slacken her speed until there is apparent danger of collision and that every vessel has the right to act on the belief that any ship approaching will give such notice as the local usages of the place or the general rules of the sea require. The same rule is announced in

The Kaiserin Maria Theresa, 149 Fed. 97, 99.

And compare

The Servia, 149 U. S. 144, 37 L. Ed. 681, 13 Sup. Ct. 817,

where the Supreme Court again refused to condemn a vessel for a failure to stop her engines at an earlier time, the court pointing out that there is in no case any duty to stop until there is reasonable apprehension of danger.

In the light of these authorities, we contend that the KOYEI MARU cannot be charged with fault for failing to stop at 2:04. Three officers on the bridge using binoculars, and another officer on the forecastle head, exercising all due diligence, saw nothing that indicated risk of collision, certainly nothing that *even suggested* a tug and tow. Captain Watanabe did all that any competent navigator, by any reasonable test, could be expected to do. He slowed his engines and proceeded ahead, carefully watching the bearings of the lights to right and left broaden as he proceeded. Neither the law nor the evidence can justify the finding that the KOYEI MARU was at fault for failing immediately to stop or reverse.

3. The Koyei Maru Was Not at Fault in Failing to Cut in Closer to the Breakwater in Proceeding Out to Sea.

It may be conceded, from what we now know, that although no rule required her to do so, the KOYEI MARU could have avoided collision if she had turned sharply to the right, around the breakwater and it may also be conceded that vessels bound for San Francisco normally take this course. Here, however, the KOYEI MARU was confronted with some vessel on her starboard hand, the intention and course of which she could not then determine. She did put her rudder to the right and blew a single blast. This signal elicited no response from the other vessel as to her apparent intention, in which situation apparently the only safe course for the KOYEI MARU to take was to do exactly what she did, namely, to go under the stern of the vessel on the right. Article 22 of the International Rules says expressly:

> "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Even Captain Jorgenson, appearing as an expert for the DAVID P. FLEMING testified that if he saw the light of a *vessel a point off his starboard bow he would pass her on his starboard side.* [Ap. p. 304.] Captain Watanabe had no way of telling whether the course of the DAVID P. FLEMING was south, southeast or southwest. It looked to him as if she were proceeding to the west of a southerly course. Indeed she may well have been. If her course

had been southwest, he might have gotten into very close quarters and possibly serious trouble if he had attempted to have passed ahead of that vessel and turned sharply around the breakwater. It was error, therefore, for the court to find that it was dangerous or negligent for the KOYEI MARU to follow the course she took.

4. The Koyei Maru Was Not at Fault With Respect to Her Lookout.

The court made a finding to the effect that the KOYEI MARU did not have a proper lookout, and that the chief officer stationed on the forecastle head, was engaged in other duties prior to the time of the collision. This finding is directly contrary to the only evidence in the case. It is based upon a single answer of the witness T. Hata to written interrogatories to the effect that he prepared two large cork fenders about the time of the collision. In the nature of things these fenders could have been brought into use only at the very instant that a collision appeared to be inevitable. It must be remembered that this witness had to be examined on written interrogatories in a foreign language, without any opportunity to amplify any answer that might be indefinite. No legitimate inference can be drawn that this work was not done in the few seconds immediately prior to the collision. His duties in connection with the anchor consisted of ordering it dropped a minute before the collision. Hata testified unequivocally that he was at his post on the forecastle head to keep a good lookout; *that he had no other duties* and

that for a period of about thirty minutes prior to the collision this was true. [Ints. 14, 15 and 16, Ap. p. 38.] There is no testimony in the record from which a deduction could be made that the first mate was in the slightest degree inattentive to his duties or that his attention was diverted by anything else from the time the FLEMING's lights were first seen until just before the collision occurred.

5. The Koyei Maru Was Not at Fault for Her Failure to Identify the Lights at an Earlier Time or to Hear the Alleged Danger Signals.

All of the officers of the KOYEI MARU testified that they carefully observed the lights that were visible, not merely with the naked eye but with binoculars. None of them identified the faint lights visible on the second and third scows as green lights until a considerable time after they were first seen. Possibly it might have been easier to determine their color if the lighthouse at the end of the breakwater were anything but a green light itself. Be that as it may, it would be unfair from this record to contend that the KOYEI MARU's officers were not on the alert and attentive to their duties. The fact that the color of the lights could not be determined at an earlier time must be attributed to the dimness of the lights, and hence charged to the FLEMING rather than to the KOYEI MARU.

The same thing is true of the alleged danger signals. The witnesses on the FLEMING with rather remarkable unanimity testified to a series of four danger signals blown at intervals of a minute or so from four and one-half to five minutes before the collision until a few seconds

prior thereto. All of their witnesses testified to the perfectly amazing carrying power of this whistle—indeed, it appears that they use it for an alarm clock to rouse them from their repose in their suburban homes in the vicinity, —yet not a single witness on the KOYEI MARU heard any whistle from the DAVID P. FLEMING at any time. If these whistles were blown, they must have been sounded considerably later and closer together than the FLEMING'S witnesses believe. It is altogether unlikely that the first danger signal could have been blown at the very time that Captain Watanabe blew his single blast and all of the officers were listening attentively for some response in order to learn, if possible, something of the intentions and course of the other craft. It is possible, of course, that one or more of these whistles were "blanked out" by the three blast signals blown by the KOYEI MARU. This, however, was at 2:06 and afterwards, when the KOYEI MARU was already aware of the presence of at least one scow at which time a danger signal would have been of no assistance whatever to the KOYEI MARU in avoiding the collision. It is hardly conceivable that if these whistles were blown at the time and in the manner claimed, the KOYEI MARU would have missed hearing every single one of them. The only conclusion that can be drawn is that these signals, if blown, were all blown in the three minutes between 2:06 and 2:09, rather than commencing at or about 2:04. None of the FLEMING'S witnesses pretends to have timed these whistles; when they were blown is entirely a matter of an estimate after the event, and from the whole record the only reasonable inference is that the testimony as to the time on the part of the FLEMING'S witnesses is inaccurate.

D.
Conclusion.

It is respectfully submitted that the decrees against the KOYEI MARU should be reversed and the lower court directed to enter a decree dismissing the libel of Wilmington Transportation Company and a decree in favor of the owner of the KOYEI MARU for all of its damage against the DAVID P. FLEMING and the scows with an order of reference to determine the amount thereof.

FARNHAM P. GRIFFITHS,

HAROLD A. BLACK,

McCUTCHEN, OLNEY, MANNON & GREENE,

Proctors for Libelant, Claimant and Appellant, Takachiho Shosen Kabushiki Kaisha, Ltd. (United Ocean Transport Co.).